

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

MURDEN COVE PRESERVATION
ASSOCIATION,

Appellant,

vs.

KITSAP COUNTY; STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY; and THE ARONA
CORPORATION,

Respondents.

SHB Nos. 87-4 and 87-11

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a shoreline substantial development and conditional use permit to construct a 20-lot residential development on Murden Cove, Bainbridge Island, Kitsap County, came on for hearing before the Shorelines Hearings Board; Wick Dufford, Lawrence J. Faulk, Judith A. Bendor, Nancy Burnett and Richard Gidley, on July 8 and 9, 1987, in Winslow, Washington; and on July 13 and 14, 1987, in Lacey, Washington. Mr. Dufford presided.

CORRECTED VERSION

Appellant Association was represented by David A. Bricklin,
Attorney-At-Law. Respondent Kitsap County appeared by Scott M.
Missall, Deputy Prosecuting Attorney. Jay Manning, Assistant Attorney
General, appeared for the Department of Ecology. Richard A. Du Bey,
Attorney-At-Law, represented the Arona Corporation. Court reporter
Gene Barker and Associates reported the proceedings.

Witnesses were sworn and testified. Exhibits were examined. The
Board conducted a site visit. Arguments were presented by
post-hearing written briefs submitted by July 28, 1987. From the
testimony, evidence and contentions of the parties, the Board makes
these

FINDINGS OF FACT

I.

Murden Cove lies north of the town of Winslow, on the east shore
of Bainbridge Island, affording views to the east across the Puget
Sound of the skyline of the City of Seattle. On the shores of the
Cove are numerous residences, some of which have been in existence
since well before the enactment of the Shoreline Management Act of
1971.

At the head of the Cove is a largely undeveloped tract,
approximately 28 acres in size which is the site of proposed
development and is the subject of this case. The tract is irregular
in shape, consisting of about 20 acres of uplands and 7.8 acres of
tidelands.

1 Its northern boundary is along Manitou Beach Road. On the west, the
2 property extends southerly from the Road to Murden Creek, and then,
3 the southern boundary is formed by the final sweeping curve of Murden
4 Creek as it flows into the Cove. The eastern boundary is principally
5 along the Cove itself. The property includes approximately 1100 feet
6 of shore along the Cove and an additional 900 feet along the creek.

7 The tract is designated Conservancy under the Kitsap County
8 Shoreline Master Program, (KCSMP), as approved by the Department of
9 Ecology. The neighboring shorelines are designated Semi-Rural. None
10 of the areas involved are within shorelines of statewide significance.

11 II.

12 Murden Creek as it borders the property is subject to tidal
13 influence. Where it flows into the Cove an estuary is created.
14 Estuaries are among the natural systems afforded special protection
15 under the (KCSMP). The existence of Murden Creek estuary is the
16 primary reason for the Conservancy designation of the tract in
17 question.

18 III.

19 Respondent, Arona Corporation, a closely-held Washington
20 Corporation, is the owner of the proposed development site. Arona
21 proposes a planned unit development, (PUD), involving the construction
22 of high-quality homes on 20 lots within the upland acreage of the
23 site. The 7.8 acres of tidelands will not be built on, and an
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additional 3.3 acres of uplands adjacent to the Murden Creek estuary
will be left undeveloped. The development is to be called "Blue Heron
Hills".

IV.

Appellant, Murden Cove Preservation Association (MCPA), is a
non-profit Washington corporation which includes in its membership
property owners that reside on or near Murden Cove. The Association
does not oppose all residential development on the "Blue Heron Hills"
site, but is concerned about the environmental effects of the instant
proposal and argues that the project involves residential development
which is too dense for the site and for the neighborhood.

V.

Arona applied to Kitsap County for a shoreline substantial
development permit under the Shoreline Management Act (SMA) on July
24, 1986, in conjunction with an application for preliminary plat and
planned unit development approval. (The plat and PUD approval are not
issues in this appeal.) The County's Hearing Examiner, on October 22,
1986, recommended approval of the project with the imposition of 14
conditions. On December 8, 1986, the County Commissioners adopted the
Hearing Examiner's recommendations and added four more conditions.
MCPA appealed this decision to this Board.

However, after receiving the shoreline permit documents, the
Department of Ecology returned the file to the County, stating that

1 the proposal should be processed as a shorelines conditional use
2 permit. The County acquiesced and, after consideration of the
3 conditional use permit criteria, approved the project again on March
4 2, 1987. New conditions, suggested by Ecology, were added. On March
5 4, 1987, Ecology approved the conditional use permit.

6 A second appeal, challenging the conditional use permit was lodged
7 with this Board by MCPA on March 13, 1987. The request for review was
8 certified by Ecology and the Attorney General on March 27, 1987. Both
9 appeals were consolidated for hearing. A pre-hearing conference was
10 held on April 14, 1987. A schedule for pre-hearing motions and an
11 accelerated discovery process was established, culminating in a
12 four-day hearing on the merits in July, 1987.

VI.

14 The County initially processed the permit as an ordinary
15 substantial development on the assumption that the uplands on the
16 project site are within a Semi-Rural shoreline environment. The
17 County had earlier amended its shoreline master program to change the
18 designation of the uplands from Conservancy to Semi-Rural. For
19 reasons unknown, however, this amendment was never submitted to
20 Ecology for approval and, therefore, never became a part of the
21 effective state-approved program for the County.

22 Under the state-approved program, residential development is a
23 permitted use in a Semi-Rural environment, but requires a conditional
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use permit in a Conservancy environment. Thus, conditional use permit
criteria are properly applicable to this proposal.

VII.

The 14 conditions stated in the Hearing Examiner's decision of
October 22, 1986 are as follows:

1. That all applicable Bremerton-Kitsap County Health Department regulations be adhered to prior to final approval.
2. That the requirements of the North Bainbridge Island Water District and the County Health Department be adhered to in the design and installation of the water system.
3. That the applicant provide fire hydrants, fire flow and fire protection systems adequate to meet the requirements of the Kitsap County Ordinance No. 96 (Fire Flow) and comply with the requirements of the Kitsap County Fire Prevention Bureau in all respects.
4. That the requirements of the Department of Public Works, Engineering Division as outlined in the attached letter dated September 5, 1986, regarding the requirements of roads and access be adhered to.
5. Road approach permits must be obtained from Public Works Department before construction begins.
6. Access to all lots shall be from interior streets only.
7. Prior to final approval or any construction activity on site, the following must be submitted to and approved by the County Public Works Department:
 - a. Final detailed drainage construction plan.
 - b. Prior to making any improvements on the property such as land clearing and/or other construction, a silt and erosion control plan shall be submitted to the County Engineering office and be approved. These facilities shall be in operation prior to land clearing and/or construction and satisfactorily maintained until construction and

landscaping are completed and the potential for on-site erosion has diminished.

c. The owner shall be responsible for maintenance of the storm drainage facilities for this development following construction. Prior to the issuance of any occupancy permits for this development, the person or persons holding title to the subject property for which the detention facility was required shall record a Declaration of Covenant which guarantees the County that the system will be properly maintained. Wording must be included in the covenant which will allow the County to inspect the system and perform necessary maintenance should it become evident that the system is not performing properly. This would be done after notifying the owner and giving him a reasonable period of time to do the necessary work. Should County forces be required to do the work, the owner will be billed the maximum amount allowed by law.

8. That all other pertinent requirements of Section 14 of the Kitsap County Zoning Ordinance regarding Planned Unit Development be adhered to.

9. Signs shall comply with the requirements of Section 19.b of the Kitsap County Zoning Ordinance.

10. That a Homeowner's Association and/or Protective Covenants, Conditions and Restrictions be established prior to final Plat/Planned Unit Development approval to ensure the perpetual maintenance of private roads, storm drainage facilities, landscaping, recreational facilities and common Open Space.

11. The plat shall be limited to one residence per lot. Guest houses shall not be permitted.

12. That the road name(s) be approved by the Addressing Division prior to final Plat/Planned Unit Development approval.

13. All proposals of the applicant shall be conditions of approval. This shall include buffers, minimum setbacks, road improvements, sidewalks, landscaping and recreational facilities.

14. That a Substantial Development Permit be approved pursuant to the Shorelines Management Master Program.

VIII.

The Conditions incorporated into the shorelines substantial development permit by the County Commissioners on December 8, 1986, are:

1. All 14 conditions stated in the Hearing Examiner's decision of October 22, 1986, shall become conditions of this permit.

2. The gravelled storage parking being proposed within the open space along the southern portion of the property shall be eliminated.

3. Individual bulkheads along the 100 feet of shoreline shall be prohibited except where it can be demonstrated shoreward erosion control measures are necessary. In such case the following performance standards shall be met:

- Bulkheads should be constructed only for the protection of upland property or facilities not for the indirect purpose of creating land by filling behind the bulkhead.

- Bulkheads should be located and constructed in such a manner as to not adversely affect nearby beaches and to minimize alterations of the natural shoreline.

- Bulkheads should be constructed so as to not adversely affect adjoining property, to blend in with the surroundings and to not detract from aesthetic qualities of the shoreline.

- Bulkheads of rip-rap construction are preferred over the other types of construction, e.g., timber or concrete.

4. Beach access or stairways are permitted. Joint use of combined accesses which follow shared property lines should be encouraged.

5. There shall be no permanent alteration of the existing drift log beach berm which fronts the 1100 feet of shoreline.

IX.

The conditions added at Ecology's request in the Conditional Use Permit approved March 2, 1987, are:

1. A building/structure setback of 100 feet, as measured from the toe of the bank, will be delineated on the face of the plat for lots 1,2,3,4,8,9,10 and 11. Lot 6 will have a 75 foot setback and lots 5 and 7 will have a setback splitting the difference between 100 feet and 75 feet.

2. This area will be noted on the face of the plat as a "native vegetation zone". The following will be included in the Shoreline Conditional Use Permit as a condition of approval:

" The native vegetation zone" as depicted on the face of the plat is to preserve the natural character of the marine oriented upland area. Within this zone, only native shrubs, trees and herbs, representative of the native species already present, shall be planted."

Lawns, beauty bark and introduced ornamental plants (non-native) are not permitted. Selective clearing during the initial development of the plat will be conducted in a manner which preserves the maximum number of old growth trees while providing marine views from all lots. The "Blue Heron Hills" covenants will be amended to reflect this condition.

X.

Applicant Arona does not contest any of the conditions imposed. The project which emerges from the permit process has the following principal features:

1. The area along Murden Creek on the south end of the property will be left in its heavily-forested natural state.

2. The beach along the head of the cove will be undisturbed, without bulkheading, unless erosion control becomes necessary.

3. A strip of land 75 to 100 feet wide across the shoreward side of the waterfront lots will be kept free of all structures and maintained in native vegetation.

4. There are two tiers of lots, eleven along the waterfront and nine in the interior - all oriented to look out toward the cove. A strip of open space will be maintained between waterfront lots 4 and 5 in order to provide beach access for interior lot owners.

5. One residence may be constructed on each lot. All lots exceed 20,000 square feet in size. Houses will be limited to 30 feet in height and will be subject to restrictions as to materials and colors so as to blend with the natural surroundings. All utility lines will be underground.

6. The public access road will contain a curtain drain to capture run-off waters which will be routed through an oil/water separator to a low-lying wetland area on the northeast part of the property where natural filtering will occur before the run-off waters enter the Cove.

7. Houses will be served by individual on-site septic tank and drain field systems. Should sanitary sewers become available, the owners will be required to hook-up.

XI.

The estuary is a sensitive environment. Murden Cove is designated Class AA water. State Standards for fecal coliform bacteria for Class

1 AA waters were violated in 1987 at three different sampling locations
2 in the estuary. Shellfish are found in the Cove, though on the one
3 day when samples were taken, coliform standards in shellfish were
4 met. The source of the present contamination is from the Creek,
5 apparently originating upstream. Such contamination is commonly found
6 in Kitsap County along moderately developed watersheds. Failure to
7 adequately treat sewage on the subject property would further worsen
8 the current contamination.

9 XII.

10 No septic tank and drain field system may be installed until final
11 approval is given by health officials on review of detailed, specific
12 designs. The permit at issue requires "Blue Heron Hills" to comply
13 with County Health Department regulations. The applicant has stated
14 that he will not seek the waiver of any such regulations. However,
15 the failure of septic tanks on Murden Cove has occurred. The
16 potential for contamination of the Cove from inadequate on-site sewage
17 systems is substantial.

18 XIII.

19 There is adequate land surface area, within applicable standards,
20 on all lots of the project to accommodate primary and reserve drain
21 fields for at least three-bedroom sized houses, taking into
22 consideration required setbacks. This includes the front tier lots
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1 which are subject to the "no-structure" setback from the toe of the
2 bank. A 100 foot setback from surface water for drain fields is
3 independently required by health regulations.

4 XIV.

5 For on-site sewage disposal systems to treat sewage effectively,
6 there must be enough permeable top soil to provide appropriate
7 vertical separation between the bottom of the drain field trenches and
8 the top of the ground water table or impervious layer (the restrictive
9 layer). If the needed depth of native soils of adequate permeability
10 is not found, alternate methods of accomplishing the same treatment
11 are available using mound or sand filter systems.

12 XV.

13 The lots in the project site drain either directly to the Cove, or
14 drain toward Murden Creek which in turn empties into the Cove. (Some
15 lots can drain both ways.) There are steep banks above the Creek and
16 the Cove. The lots' slopes measure up to 17%. Under Environmental
17 Protection Agency Guidelines slopes of this steepness pose severe
18 limitations of the ability of septic tank and drainfield systems to
19 provide adequate treatment.

20 Soil depth above the restrictive layer varies, but does not
21 provide enough soil for 36 inches of vertical separation between drain
22 field trench bottoms and the restrictive layer.

1 We were convinced by expert testimony that this situation presents
2 a likelihood of unreasonably adverse effects on the environment
3 (through exacerbation of fecal coliform in the estuary), unless the
4 systems installed can provide the equivalent of such vertical
5 separation.

6 XVI.

7 The upland lots are located on a plateau area. The easterly
8 portion of these lots drains toward the Cove. This drainage will be
9 intercepted by the curtain drain under the access road which bisects
10 the site.

11 The houses on these lots will be located toward the easterly side
12 in order to take advantage of views of the Cove. Run-off from roofs
13 and other impervious surfaces connected with these houses will be
14 tight-lined to the curtain drain, which leads to the oil/water
15 separator and low lying wetland area. Arona has agreed to insure that
16 the homeowners will maintain this stormwater system.

17 Some portion of the run-off from the upper lots will drain to the
18 west and southwest. Four of the lots (12-15) are directly above
19 Murden Creek as it curves around the southerly end of the project.
20 All along the westerly boundary of these lots the proposal calls for a
21 no-cut buffer. Under the circumstances, we find that there is
22 unlikely to be significantly more run-off toward Murden Creek from
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1 these lots than currently exists. We are unconvinced that the
2 construction of the "Blue Heron Hills" development poses an added
3 threat to the stability of the banks above the Creek.

4 XVII.

5 The estuarine system includes the stream itself, a small salt
6 marsh (across the stream from the southeast portion of "Blue Heron
7 Hills"), and forest in proximity to the stream.

8 The "Blue Heron Hills" project involves some clearing on
9 residential lots in order to provide room for houses and for views.
10 The majority of this work has been done. No further clearing of any
11 vegetation with a stem greater than six inches in circumference at
12 chest height may be performed.

13 Much of the forest close to the estuary has been and will be left
14 untouched. Estuary protection is a prime function of the 3.3 acre
15 natural area at the south end of the site. Ground cover will remain
16 in the area and, likewise, will be present throughout the 75-100 foot
17 wide "native vegetation zone", where a re-vegetation plan is going
18 forward.

19 We are persuaded that sufficient canopy and ground cover
20 vegetation will be retained to prevent erosion, protect water quality
21 and maintain the character of the estuarine environment.

22 We are further convinced that the habitat for wildlife and
23 shorebirds will be adequately protected.

XVIII.

The requirements for retention of vegetation (including the 3.3 acre natural area and other no-cut zones), for construction and maintenance of storm drain systems, for construction and maintenance of on-site sewage disposal systems (including the condition imposed herein), for the setback from the shore, and for the essentially undeveloped condition of the beach and tidelands, lead us to find that the estuary is not likely to be materially disturbed by this project.

XIX.

The distance between residential structures and the ordinary high water mark will be adequate to protect water quality, protect the natural systems and ensure the integrity of the shoreline environment.

XX.

The past use of the "Blue Heron Hills" property has been residential. Currently, there are three houses on the site. In the past the property was used as a trailer park, housing as many as eight trailers at a time. However, the current appearance is largely undeveloped.

Other uses allowed outright in the Conservancy environment include agriculture, aquaculture, recreation and forest management. No adverse effects on the existence or potential for such uses is likely to result from the further residential development of this privately owned plat. Moreover, we were not shown that this development on

private property will have any effect on the public use of any public shorelines.

XXI.

Appellant presented an architects rendering of the "Blue Heron Hills" site when developed, from a vantage directly in front of the property in the Cove. This, is not the view which would be observed from other residences around the cove. Moreover, we were not persuaded that it provided an accurate picture of how the development will likely look in fact.

From the water looking at the north shore of the Cove, a substantial amount of residential development is evident, much of it unscreened by trees. To the south there are some homes which are partially screened by vegetation. The degree of screening depends on the vantage point of the viewer.

The residential development at "Blue Heron Hills" would, we find, be visually compatible with the existing development around the cove.

XXII.

The "Blue Heron Hills" development is comparable in density with development existing in the Murden Cove neighborhood. When both the waterfront to be occupied by houses and the water front to be left in open space are considered, the development of the property is less dense per 1000 feet of shore than some other stretches of private

1 waterfront along the cove. We find that design of the site plan is
2 compatible with its surroundings.

3 XXIII.

4 The existing character of the Conservancy environment designation
5 at the subject site is of residential use adjacent to a natural,
6 estuary. The prime objective of the designation is fulfilled by the
7 restrictions (including the one imposed herein) which preserve and
8 protect the estuary. The proposed density and site coverage of
9 housing on the property will not interfere with that objective. We
10 are not able to find that the existing character of the area will be
11 substantially degraded by this development.

12 XXIV.

13 Appellant has sought to show that the density of this development
14 is excessive by comparing it with existing residential densities in
15 other Conservancy areas in the County. An appropriate comparison of
16 residential densities per 1000 feet of shore should include the total
17 of private waterfront along the areas compared. When this is done,
18 the residential density of the "Blue Heron Hills" development does not
19 appear significantly different from that in other Conservancy areas.

20 Notwithstanding this result, we have attributed little weight to
21 such comparisons because we are not convinced that the densities shown
22 reflect truly comparable conditions. The specific value sought to be
23 preserved by Conservancy designation varies from site to site, as do
24 the topography and physical features extant. Moreover, the

1 comparisons show only how "Blue Heron Hills" compares in density with
2 what presently exists and do not evaluate the potential of other
3 Conservancy areas for further development.

4 XXV.

5 Any Conclusion of Law which is deemed a Finding of Fact is hereby
6 adopted as such.

7 From these Findings the Board come to the following:

8 CONCLUSIONS OF LAW

9 I.

10 We review permits for consistency with the Shoreline Management
11 Act and the applicable shoreline master program. By virtue of RCW
12 90.58.140 (7), the appellant has the burden of proof.

11.

14 The issues raised involve four areas under the KCSMP:

- 15 1. The special criteria for conditional use permits.
- 16 2. Use activity policies for residential development.
- 17 3. Policies relating to natural systems.
- 18 4. The definition and purpose of the Conservancy environment.

19 We will address these in the order listed.

III.

The criteria for granting a conditional use permit are in addition to all other requirements for development under the KCSMP. There are four criteria for granting a conditional use permit:

1. The use will cause no unreasonably adverse effects on the environment or other existing or potential uses which are allowed outright in the subject environment. (Emphasis added).

2. The use will not interfere with public use of the Shorelines.

3. Design of the site will be compatible with the surroundings and the Master Program.

4. The proposed use will not be contrary to the general intent of the Master Program. KCSMP, p. 8-3

Under our findings we conclude that the project will conform with these criteria if an additional condition is added to prevent unreasonable adverse effects to the environment.

This condition is imposed solely as a matter of shorelines law, to insure consistency with the conditional use requirements of the KCSMP. By adding it, we do not presume to predict what requirements may be imposed by jurisdictional health authorities to insure compliance with their regulations.

The condition to be added is as follows:

A vertical separation of at least 36 inches between the bottom of drain field trenches and the restrictive layer shall be available where conventional septic-tank and drainfield systems are installed. Where such separation

is not available, alternative systems providing equivalent separation shall be employed.

See Findings of Fact XI, XII, XIV, XV, XVI, XX, XXI, XXII.

IV.

The use activity/policies for residential development in contest here are, as follows:

- The planned unit development concept should be encouraged on the shoreline.
- Residential development, including residential subdivisions should be designed at a level of density and site coverage which is compatible with the character of the shoreline environment.
- Adequate distance between the ordinary high water mark and residential structures should be maintained to protect water quality, protect natural systems and insure the integrity of the shoreline environment.
- Sewage disposal....must be provided in accordance with local and state health regulations... KCSMP, p. 7-21

Under our findings, we conclude that all of these policies will be met by this project. See Findings of Fact XII, XVII, XIX, XXI, XXII, XXIII.

We note that what constitutes compliance with local and state health regulations is unclear. For purposes of the applicable residential development criterion, however, it is sufficient that Arona has committed to comply with such regulations and it has not been shown that they will be unable to do so.

V.

The KCSMP emphasizes the protection of natural systems from man-made disruption. Estuaries are expressly included among those systems to be protected. The program states that:

... estuaries should be left undisturbed or may be improved when it is beneficial to aquatic life or wildlife. KCSMP, p. 5-2

In addition, the program provides that:

Sufficient canopy and ground cover vegetation should be retained or may be provided to prevent erosion, protect water quality and maintain the character of the environment.

Shoreline areas which are significant habitats for wildlife and shorebirds should be protected. KCSMP, p. 5-2

Under our findings we conclude that these policies are not violated by this project. Disturbance of the estuarine environment will be minimal. See Findings of Fact XVII, XVIII.

VI.

Because residential development in a Conservancy environment is allowed if the criteria for a conditional use permit are met, we must conclude that a development which meets these criteria is not inconsistent with the Conservancy designation. This is merely an application of the well-known rule of construction requiring legislation to be construed so that it is internally consistent. See, e.g., Nisqually Delta Assoc. v. City of Du Pont, 103 Wn.2d 720, 696P. 2d 1222 (1985).

Nonetheless, even were the definition and purpose of the Conservancy environment considered independently, we would perceive no difficulty with locating this project at the particular site in question.

By definition the Conservancy environment "is for those areas which are intended to maintain their existing character", and for uses "which do not substantially degrade the existing character of an area". The purpose is

"to protect, conserve and manage existing natural resources in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization." KCSMP, p. 4-3

The preservation of the estuary fulfills the principal reason for designating the area Conservancy. The uses allowed will not be consumptive of resources in a fashion which threatens the integrity of the targeted natural system. Substantial degradation of the existing character of this system will not occur nor will there be an affect on recreational benefits to the public or sustained resource utilization. See Findings of Fact XX, XXI, XXII, XXIII, XXIV.

VII.

We have considered appellant's general assertion that the proposed development is inconsistent with the policies of the Shoreline Management Act. This assertion was not accompanied by the presentation of evidence.

VIII.

Any Finding of Fact which is deemed a Conclusion of Law is hereby
adopted as such.

From these Conclusions the Board enters the following

ORDER

The conditional use permit issued by Kitsap County to the Arona Corporation is affirmed with the addition of the condition specified in Conclusion of Law, III. The matter is remanded to Kitsap County for the issuance of a permit incorporating that condition.

DONE THIS 9th day of October, 1987.

SHORELINES HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 10/9/87
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member

Nancy Burnett
NANCY BURNETT, Member

Richard Gidley
RICHARD GIDLEY, Member